CHAPTER 12

Labor and Employment Law

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§ 12.1. Introduction. The major labor and employment law cases decided during the *Survey* year are divided, for the purposes of this section, into six broad categories. The first category includes those cases dealing with the enforcement of public sector arbitration awards under General Laws chapters 150E and 150C. The limitation period for petitioning to vacate labor arbitration awards is the subject of the second category. The third category of cases involves the reviewability of pre-hearing dismissal decisions of the Massachusetts Labor Relations Commission under General Laws chapter 150E. The fourth category of cases examines the authority of the Massachusetts Civil Service Commission under General Laws chapter 31, the civil service law. The emerging area of wrongful discharge litigation is the focus of category five, and, finally, the ability of a public employer to require its employees to undergo lie detector tests is discussed in category six.

In addition to the foregoing, during the *Survey* year the legislature enacted an important amendment to chapter 150E. That amendment, although relatively unpublicized, represents an important aid to public sector unions in the battle for power balance within the negotiations process. The following sections report and analyze these developments.

§ 12.2. The Enforcement of Public Sector Arbitration Awards Under Chapters 150E and 150C. Perhaps encouraged by its success during the 1985 *Survey* year at limiting the availability of arbitration as a forum for review of managerial decision-making within the public sector,[1] municipal employers launched an aggressive attack during the 1986 *Survey* year at the very heart of the contractual arbitration process by asking the Supreme Judicial Court to rule that teacher unions could not arbitrate the suspension or discharge of tenured public school teachers under a contractual just cause standard. Specifically, school committees within three municipalities sought judicial review in separate proceedings seeking

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§ 12.2 [1] See McDonald, *Labor and Employment Law*, 1985 ANN. SURV. MASS. LAW, § 9.2, at 261–72, and Ross, *Labor and Employment Law*, 1981 ANN. SURV. MASS. LAW, § 7.5, at 181–85, for discussion of the nondelegation doctrine, and its limiting effect on the right to arbitrate certain issues within the public sector.

vacation of arbitration awards arising out of standard just cause clauses contained within collective bargaining agreements negotiated pursuant to chapter 150E. These agreements reversed, in whole or in part, decisions by the committees to suspend or discharge tenured school teachers because of non-budgetary, performance related reasons.[2] In each case, the school committees asked the Court to declare that the arbitrator exceeded his or her authority by intruding into areas left by state law — particularly chapter 71, sections 37 and 42 — to the nondelegable discretion of the committees.

Several years earlier, the Court had held in a trilogy of cases that a school committee's decision to grant or deny tenure was not a proper subject for arbitration, except where the decision was attacked only on grounds that pre-decisional evaluation procedures mandated by contract had not been followed.[3] This year, the Court disposed of the three current challenges in a new trilogy of cases, and all three cases were resolved against the committees, and in favor of the arbitrators' awards.

In *Old Rochester Regional Teacher's Club v. Old Dorchester Regional School District Committee*,[4] the school committee dismissed a tenured teacher with nineteen years service for allegedly pulling a student's hair and using foul language.[5] Following arbitration, which had been unsuccessfully resisted by the school committee before both the superior court and the Appeals Court, the teacher's union sought enforcement of the arbitration award that had reduced the dismissal to a 30-day suspension and reinstated the teacher with back pay and benefits. The school committee opposed enforcement arguing that the termination was not arbitrable, and that the arbitrator had exceeded his authority by substituting his judgment for that of the committee on a policy issue.[6] The Court rejected both arguments.

With respect to arbitrability, the committee contended principally[7] that

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[2] An interesting, yet open question is whether a public employer that seeks to vacate an arbitration award under a just cause clause freely negotiated by such employer, on grounds that the clause illegally intrudes into its statutory powers, commits a prohibited practice under chapter 150E § 10(a)(1) and (5). It is at least arguable that such conduct constitutes bad faith bargaining, irrespective of the merits of the claim for vacation.

[3] *See* School Comm. of Danvers v. Tyman, 372 Mass. 106, 360 N.E.2d 877 (1977); Dennis-Yarmouth Regional School Dist v. Dennis Teachers Ass'n, 372 Mass. 116, 360 N.E.2d 883 (1977); and School Comm. of West Bridgewater v. West Bridgewater Teachers Ass'n, 372 Mass. 121, 360 N.E.2d 886 (1977).

[4] 398 Mass. 695, 500 N.E.2d 1315 (1986).

[5] *Id.* at 697, 500 N.E.2d at 1317.

[6] *Id.*

[7] The committee also argued that an order by the trial court to arbitrate was defective because that court had failed to make an underlying finding that an agreement to arbitrate had existed pursuant to the requirement of chapter 150C, § 2. The Court concluded that

it had no duty to arbitrate because its collective bargaining agreement had expired before it had voted upon the teacher's dismissal, and a new collective bargaining agreement, by its own terms non-retroactive, had not been executed until after such vote. Citing the United States Supreme Court decision in *Nolde Bros. v. Local 358, Bakery and Confectionary Worker's Union*,[8] the Court concluded that a public employer could be required to arbitrate after the expiration of its collective bargaining agreement, so long as the dispute at issue rose under the agreement.[9] Accordingly, because the events precipitating the grievance arose while the agreement had been in effect, and the school committee had brought charges against the teacher prior to the expiration of the agreement, the Court found that the "dispute over the termination arose under the agreement" and was arbitrable.[10]

With respect to the school committee's second major argument, the Court similarly demurred. In response to the contention that it should extend the nondelegability doctrine it had applied as a bar to the arbitration of tenure decisions in *School Committee of Danvers v. Tyman*,[11] to bar the arbitration of dismissal decisions as to already tenured teachers, the Court explicitly found the nondelegability doctrine inapplicable to the latter issue. The Court relied upon chapter 150E, section 8,[12] which provides for the enforcement of public sector arbitration awards under chapter 150C and establishes that arbitration, where elected, is to be the exclusive procedure for resolution of dismissal grievances notwithstanding the judicial review provisions of the teacher tenure law, chapter 71,

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the lower court's order to arbitrate subsumed such a finding, and under Rule 52(a), MASS. R. CIV. P., that finding did not have to be stated. *Id.* at 698, 500 N.E.2d at 1318.

[8] 430 U.S. 243, 249 (1977).

[9] *Old Rochester Regional Teacher's Club*, 398 Mass. at 699, 500 N.E.2d at 1318.

[10] *Id.*

[11] 372 Mass. 106, 360 N.E.2d 877 (1977).

[12] G.L. c. 150E, § 8 states that:

> The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the commission upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of section thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive of chapter seventy-one.

sections 42 and 43. The Court concluded, therefore, that the legislature had intended to permit arbitration of dismissal grievances by tenured teachers. Because the legislature's intent to permit delegation of dismissal disputes to arbitration was so clearly expressed in chapter 150E, section 8, the Court reasoned, there was no basis to invoke the nondelegability doctrine to bar arbitration.

Alleged teacher misconduct was also at issue in *School Committee of Waltham v. Waltham Teachers Association*,[13] where the school committee suspended a tenured teacher without pay for 10 days for striking a student. Although the teacher admitted that he struck the student, he resisted the discipline on some unusual, albeit compelling, mitigating circumstances.

Specifically, a thumb-tack had been placed by a student on the teacher's chair in his absence. When the teacher sat down the tack penetrated a testicle, causing the teacher to bolt out of the chair and strike another nearby student. When he discovered that the student he had struck was not the one who had left the tack on his chair, the teacher, in a flourish of frontier nobility, offered the struck student an opportunity to strike him back with a wooden pointer. The teacher then reported the entire episode to school authorities. After a subsequent hearing, the school committee imposed the suspension.

The arbitrator, interpreting and applying a standard just cause clause[14] in the underlying collective bargaining agreement, concluded that the 10-day suspension was not warranted and ordered that the teacher be made whole.[15] The superior court vacated the arbitrator's award on various theories, thereby providing the Supreme Judicial Court a wide ranging opportunity to comment on several aspects of the public sector arbitration process.

Although agreeing with the superior court that the arbitrator's factual findings were arguably inconsistent, the Court, relying upon its own case holdings, rejected such inconsistencies as an adequate basis for the lower court's vacation of the arbitration award. Finding that the arbitrator had answered the question submitted to him, the Court characterized as "unimportant" the possibility that his findings were factually or legally erroneous.[16]

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[13] 398 Mass. 703, 500 N.E.2d 1312 (1986).

[14] The contract read in relevant part that "No tenured employee in a classification covered by this agreement will be discharged, disciplined, or reprimanded or reduced in rank or compensation without just cause; just cause including but not limited to inefficiency, incapacity, conduct unbecoming such employee, or insubordination." *Id.* at 704, 500 N.E.2d at 1313.

[15] The arbitrator also invited the school committee to give the teacher a warning if it wished for the pointer incident. *Id.*

[16] *Id.* at 706, 500 N.E.2d at 1313, 1314.

The Court also disagreed with the superior court's conclusion that the award violated chapter 71, section 37G. In order for the award to have conflicted with that statute — which prohibits corporal punishment of public school students — the Court reasoned that the teacher's retaliatory attack would have to have been intentional. Because the arbitrator evidently found the teacher's attack unintentional, there was no conflict with the corporal punishment statute, and no basis for vacation of the award.

Finally, the Court rejected the notion advanced by the school committee, and adopted by the superior court, that an arbitrator's authority in a contractual teacher discipline case could be no broader than a court's authority in reviewing a statutory discipline case under chapter 71, section 43A.[17] Describing the focus of judicial review of a teacher dismissal under section 43A as whether the action was "arbitrary, irrational, unreasonable, in bad faith, or irrelevant to the committee's task of operating a good school system,"[18] the Court expressly ruled that a broader de novo review, complete with a full evidentiary hearing, was properly available in arbitration. The Court determined that the right to arbitrate granted by the legislature in chapter 150E, section 8, coupled with well established parameters of arbitration under a just cause standard,[19] compelled a conclusion that a full and de novo hearing by an arbitrator was appropriate absent a lesser scope of review contained in the parties' own contract.

The final case in the new trilogy, *School Committee of Needham v. Needham Education Association*,[20] required the Court to review an award in which another arbitrator had reversed a school committee's decision to terminate a tenured teacher. The committee had fired that teacher for allegedly failing to meet minimum teaching standards. The arbitrator concurred with the committee's conclusion as to the teacher's performance, but faulted the committee for failing to provide adequate support for the teacher as he found to be required by the collective bargaining agreement. The arbitrator's award reflected his allocation of blame: he ordered the school committee to reinstate the teacher, but did not order backpay.

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[17] Chapter 71, section 43A permits a tenured teacher to contest a dismissal by filing a timely complaint in the superior court. The court is required to affirm the dismissal if it finds that it was "justified."

[18] *Id.* at 707, 500 N.E.2d at 1315 (citing Springgate v. School Comm. of Mattapoisett, 11 Mass. App. Ct. 304, 308, 415 N.E.2d 888 (1981)).

[19] *Id.* at 708, 500 N.E.2d at 1315. The Court cited to HOLDEN, GRIEVANCE ARBITRATION, PORTRAIT OF A PROCESS–COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 382 (1979) and Griffin, *Judicial Review of Labor Arbitration Awards*, reprinted in ARBITRATING LABOR CASES, at 204–05 (1974) as support for this proposition.

[20] 398 Mass. 709, 500 N.E.2d 1320 (1986).

On appeal the Court considered (1) whether the arbitrator exceeded his authority by substituting his judgment for the school committee's on the matter of just cause, (2) whether the award drew its essence from the agreement, and (3) whether the order of reinstatement was a proper exercise of remedial authority. The holdings in the *Old Rochester* and *Waltham* cases compelled the Court's disposition of the first two issues. The Court reiterated that the legislature's enactment of chapter 150E, section 8, had authorized the arbitration of tenured teacher dismissals under a just cause clause, notwithstanding the more limited scope of authority available for judicial review of teacher dismissals under chapter 71, section 43A. Moreover, under settled principles governing the judicial review of arbitration awards, the courts were not to interfere with an arbitrator's interpretation of a contract clause unless that interpretation clearly did not draw its essence from the contract. Holding that an award draw its essence from a collective bargaining agreement unless "the arbitrator's interpretations and conclusions are substantially implausible or irrational,"[21] the Court had little difficulty in finding that the award had passed muster.

The Court's resolution of the third issue was more intriguing. The grievants in *Old Rochester* and *Waltham* had been disciplined for alleged misconduct in the management of their students, rather than for the quality of their teaching. An opening existed, therefore, for school committees to argue, notwithstanding *Old Rochester* and *Waltham*, that the core educational responsibility granted them by state law precluded arbitral interference in the latter context. The *Needham* plaintiffs in fact made this argument, initially in the superior court where the award had been confirmed, and again on appeal.[22]

The superior court determined that the discharge was arbitrable because the school committee's contractual violations were procedural within the meaning of the Supreme Judicial Court's earlier decision in *School Committee of West Bridgewater*.[23] In that case the Court upheld the reinstatement of a nontenured teacher by an arbitrator because, as determined by the arbitrator, the school committee had failed to follow pre-dismissal evaluation procedures contained in the teacher's collective bargaining agreement. In so holding, the Court created an exception to the rule it had established by a decision of the same date in *School Committee of Danvers v. Tyman*,[24] where, applying the nondelegability doctrine, it held nonarbitrable a school committee decision to dismiss,

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[21] *Id.* at 713, 500 N.E.2d at 1323.

[22] *Id.*

[23] 372 Mass. 121, 360 N.E.2d 886 (1977).

[24] 372 Mass. 106, 360 N.E.2d 877 (1977).

and thereby deny tenure to, a third year teacher. By resolving the *Needham* case on the basis of the *West Bridgewater* exception, the superior court's decision could actually be read to have upheld the *Tyman* rule, and extend that rule by implication to the discharge of a tenured teacher for performance related reasons.

On appeal, although it noted the limited basis of the superior court decision, the Court neither agreed nor disagreed expressly with the rationale. By its choice of broad language to support its confirmation of the arbitration award, however, the Court appeared to endorse the arbitrability of tenured teacher discharge cases irrespective of whether those cases involved procedural or substantive issues, and whether the substantive issues involved teacher misconduct or the quality of teacher performance. In this regard, again relying upon chapter 150E, section 8, the Court concluded that the legislature had granted broad authority for arbitrators to resolve discharge grievances, including those of tenured teachers, and had contemplated that reinstatement would be ordered where the evidence indicated that such remedy was appropriate. "To hold otherwise," the Court observed, "would seriously impair the entire arbitration process."[25] Although it would have been clearer had the Court expressly adopted or rejected the superior court's procedural violation analysis, the failure to adopt that analysis, the broad language supportive of the arbitration process, and the contemporaneous decisions in *Old Rochester* and *Waltham* suggest quite strongly that an arbitrator may lawfully overrule a school committee's performance-based decision discharging a tenured teacher and reinstate such teacher, notwithstanding the nondelegability doctrine.

In summary, the new teacher trilogy was a breath of fresh air for teacher unions as it reinforced the viability of arbitration as a mechanism for resolution of discharge cases in the public education sector. Although questions surfaced during the 1985 *Survey* year[26] over the Court's commitment to arbitration within the public sector, the Court returned on its decisional arc in the 1986 *Survey* year to a position more sympathetic to the arbitration process. Whether the case law will swing back in the near future is uncertain. It will, however, have ample opportunity to do so, as the legislature's failure to have yet clearly resolved the relationship between chapter 150E and pre-existing statutory provisions related to the obligations and prerogatives of public management will continue to spawn litigation from advocates on both sides who are uncertain what to make of case law fashioned more by the judicial juggling of competing statutory goals than by logical and progressive legal reasoning.

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[25] 398 Mass. at 714, 500 N.E.2d at 1324.

[26] See *Labor and Employment*, 1985 ANN. SURV. MASS. LAW, at 26 *et seq.*

§ 12.3. The Timeliness of Applications to Vacate Arbitration Awards Under Chapter 150C. Jurisdiction for judicial review of private sector labor arbitration awards has for many years been provided by chapter 150C. In 1973, the legislature enacted chapter 150E, section 8. This statute provided that binding arbitration in the public sector would also be subject to judicial review under chapter 150C.

Section 11(a) of chapter 150C permits a party in the arbitration process to apply to the superior court for an order vacating an award upon certain enumerated, albeit narrow, circumstances. Furthermore, section 11(b) states that an application to vacate "shall be made within thirty days after delivery of a copy of the award to the applicant . . . ." Upon simple reading, section 11(b) seemed to have created a limitation period for all actions to vacate arbitration awards arising out of collective bargaining agreements negotiated pursuant to chapter 150E. In 1983, however, the Appeals Court ruled that the thirty-day limitation period established by section 11(b) did not apply to petitions to vacate that contended that the arbitrator did not have jurisdiction to hear the dispute in question.[1] The Appeals Court grounded its decision upon comments made by the Supreme Judicial Court, in a string of commercial and labor arbitration cases dating back over forty years, to the effect that "the question whether the award was in excess of the authority conferred on arbitrators is *always* open for review."[2] During the Survey year, the Supreme Judicial Court had an opportunity to review that Appeals Court's decision.

In *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transportation Authority*,[3] the Court repudiated the exception to section 11(b) that the Appeals Court had created. *Local 589* involved an underlying work jurisdictional dispute among two groups of employees and the MBTA. When the MBTA denied the work to the maintenance employees represented by Local 589, that union sought relief in arbitration pursuant to a contract clause that purported to guarantee the work to its members. The arbitrator agreed with the union and ordered payment of damages by the MBTA to the affected employees. The MBTA neither complied with the award nor moved to vacate it. Upon expiration of the thirty-day period in section 11(b), the union sued for enforcement of the award.[4]

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§ 12.3 [1] Painters Local No. 257 v. Johnson Industrial Painting Contractors, 16 Mass. App. Ct. 67, 448 N.E.2d 1307 (1983).

[2] *Painters Local*, 16 Mass. App. Ct. at 72, 448 N.E.2d at 1310 (emphasis supplied) (citing M.S. Kelliher Co. v. Wakefield, 346 Mass. 645, 647, 195 N.E.2d 330 (1964)); J.F. Fitzgerald Coast Co. v. Southbridge Water Supply Co., 304 Mass. 130, 134, 23 N.E.2d 165 (1939); Sheahan v. School Committee of Worcester, 359 Mass. 702, 709–11, 270 N.E.2d 912 (1971); and Greene v. Mari & Sons Floor Co., 362 Mass. 560, 562, 289 N.E.2d 860 (1972).

[3] 397 Mass. 426, 491 N.E.2d 1053 (1986).

[4] Chapter 150C, section 10 provides, "Upon application of a party, the superior court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged

The MBTA argued in the superior court that the arbitrator exceeded his jurisdiction. In its view, the award interfered with and was superseded by chapter 581 of the Acts of 1980, which had amended General Laws chapter 161A, section 19 — the law governing collective bargaining for MBTA unions — by restricting collective bargaining over certain inherent management rights. Siding with the MBTA, the superior court vacated the award. On direct appeal to the Supreme Judicial Court, the union argued, *inter alia*, that the superior court should have confirmed the award because the MBTA failed to seek vacation within thirty days of its receipt.

Citing the need for prompt disposition of arbitration proceedings and for finality or arbitration awards, the Court agreed with the union. Acknowledging its prior statements that jurisdictional questions are "always open" for review, the Court explained that such references described the scope of judicial review available where jurisdiction was at issue, rather than the time frame in which applicants could move applications to vacate.[5] Having undercut the rationale of the Appeals Court's contrary decision, the Court disallowed any exception to the plain language of section 11(b).[6] Accordingly, the Supreme Judicial Court reversed the judgment of the superior court and confirmed the award.

The Court's decision is sound. Allowing the exception for jurisdictional issues to stand would encourage the losing side in arbitration to procrastinate in complying with or contesting an award, knowing that it could always litigate the arbitrator's authority. Moreover, absent the application of section 11(b), there would arguably be no limitation period governing jurisdictional attacks on arbitration awards, and, therefore, no finality to the arbitration process. That possibility, together with the plain wording of section 11(b), strongly supports the Court's decision.

§ 12.4. The Right to Judicial Review of Labor Relations Commission Determinations Under Chapter 150E, Section 11. Chapter 150E, section 11 of the General Laws, authorizes the Massachusetts Labor Relations Commission to investigate complaints of prohibited practice brought against a public employer under chapter 150E, section 10(a) and against a public employee organization under chapter 150E, section 10(b).[1] When

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for vacating, modifying or correcting the award, in which case the court shall proceed as provided in Sections 11 and 12."

[5] 397 Mass. at 430, 491 N.E.2d at 1056.

[6] *Id.* at 431, 491 N.E.2d at 1057 (" . . . *all* challenges to an arbitrator's award must be brought within the time frame specified by the statute.")(emphasis supplied).

§ 12.4 [1] Section 10(a) states, It shall be prohibited practice for a public employer or its designated representative to: (1) interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; (2) dominate, interfere, or assist in the formation,

in its investigation the Commission finds probable cause to believe that an employee has violated section 10, it may issue a formal complaint and hold a hearing thereon. Chapter 150E, section 11 unquestionably provides for judicial review of the Commission's decision following such a hearing. The statute states that "[a]ny party aggrieved by a final order of the commission may institute proceedings for judicial review in the appeals court within thirty days after receipt of said order."

Open to question, however has been whether any right to judicial review exists over complaints dismissed for lack of probable cause prior to any hearing by the Commission. The Commission, arguing that post investigation dismissals do not constitute final orders within the meaning of the above quoted language of section 11, consistently has asserted that such dismissals are, unless it has clearly exceeded its statutory authority or abused its discretion, nonreviewable.[2] During the *Survey* Year the Commission had two opportunities to make that argument to the Supreme Judicial Court. On both occasions, the Court disagreed.

In *Lyons v. Labor Relations Commission*,[3] Lyons, a public employee, was covered by a collective bargaining agreement between his employer and an employee organization. That agreement contained an agency fee clause which required all nonmembers of the employee organization to pay an agency fee equal to union membership dues.[4] Lyons, a nonmember of the employee organization, refused to pay the agency fee. Instead he filed a prohibited practice charge with the Labor Relations Commission, as authorized by Commission regulations,[5] protesting the amount

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existence, or administration of any employee organization; (3) discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization; (4) discharge or otherwise discriminate against any employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has formed, joined, or chose to be represented by an employee organization; (5) refuse to bargain collectively in good faith with the exclusive representative as required in section six; (6) refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine;

(b) It shall be a prohibited practice for an employee organization or its designated agent to: (1) interfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter; (2) refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative as required in section six; (3) refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine.

[2] This position is consistent with the practice under the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, where the dismissal of an unfair labor practice charge after investigation by the General Counsel has been universally held to be nonreviewable.

[3] 397 Mass. 498, 492 N.E.2d 343 (1986).

[4] *Id.* at 499, 492 N.E.2d at 344.

[5] *See* 402 MASS. ADMIN. CODE tit. 402, §§ 17.00–17.16 (1982).

of the fee and asking the Commission to determine the amount that the organization lawfully could assess.[6] He filed charge, however, seventeen days after the expiration of the forty-five day limitation period established by 402 CMR 17.00(2). The Commission dismissed the charge without hearing as untimely, and Lyons sought relief in the Appeals Court.

Consistent with its contention that pre-hearing dismissals are not final orders within the meaning of section 11, the Commission refused to assemble the record for transfer of the case to the Appeals Court. Lyons unsuccessfully sought relief over the Commission's refusal to assemble the record from a single justice of the Appeals Court. Subsequently, the full Appeals Court reversed the single justice and ordered the record assembled. Although it concluded that it had jurisdiction over an appeal from the pre-hearing dismissal of the charge in this case, the court rejected Lyons' claim that the forty-five day limitation period for filing a prohibited practice charge over an agency fee was unconstitutional, and upheld the dismissal of his charge.[7]

The Supreme Judicial Court granted further review on both issues considered by the Appeals Court. On the jurisdictional issue, it upheld the Appeals Court's decision. The Court found that agency fee challenges were constitutionally grounded because they involved an employee's first amendment right to prevent a union from spending his money to promote political issues with which he did not agree. The Court recognized a need to construe the section 11 right to judicial review as broadly as possible.[8] The Court was concerned about the constitutionality of a mandatory agency fee clause which was not subject to meaningful judicial review. It concluded, therefore, that treating the pre-hearing dismissal of Lyons' charge by the Commission as a final order within the meaning of chapter 150E, section 11 was consistent with and essential to its prior opinion in *Greenfield*, a case regarding the constitutionality of chapter 150E, section 12.[9]

The Court reversed the Appeals Court with respect to the forty-five day limitation period for contesting agency fees at the Commission under 402 CMR § 17.06(2). The Court recognized a further constitutional consideration surrounding a contractual agency fee requirement: the need for dissenting employees to have a fair chance for evaluating the impact

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[6] The constitutionality of chapter 150E, section 12, which authorizes the assessment of agency fees in public sector collective bargaining agreements, was affirmed by the Supreme Judicial Court in School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982).

[7] *See Lyons*, 397 Mass. at 500, 492 N.E.2d at 344.

[8] *Id.* at 501, 492 N.E.2d at 345.

[9] School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982).

of the agency fee on their free speech rights, and to act upon those evaluations. The Court found that the forty-five day period "greatly circumscribed"[10] that opportunity.

Of particular importance to the Court in assessing the adequacy of the forty-five day limitation period was the existence of a six month limitation period for all other prohibited practice charges filed with the Commission.[11] Stating that the disparate limitation period would be problematic "even if a forty-five day limitation period for agency fee challenges were constitutionally adequate when viewed in isolation,"[12] the Court expressly concluded that such a period was unconstitutional on equal protection grounds. Therefore, it directed the Commission to extend the same six month limitation period to agency fee charges that it extends to all other charges.

The Supreme Judicial Court also examined the meaning of the term "final order" within chapter 150E, section 11 in *Boston Housing Authority v. Labor Relations Commission*.[13] There, the Commission dismissed a strike investigation petition filed by the Boston Housing Authority under chapter 150E, section 9A[14] after concluding that such section was inapplicable to housing authorities in light of chapter 121B, section 29.[15] The Authority appealed to the Appeals Court, and the Supreme Judicial Court took the case on its own motion.

The Commission again resisted judicial review on grounds that chapter 150E, section 11 restricted such review to post-hearing dismissals by the commission, and/or that section 9A dismissals were not included under

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[10] *Lyons*, 397 Mass. at 504, 492 N.E.2d at 347.

[11] *See* MASS. ADMIN. CODE tit. 402, § 15.03.

[12] 397 Mass. at 504 n.6, 492 N.E.2d at 347 n.6.

[13] 398 Mass. 715, 500 N.E.2d 802 (1986).

[14] Chapter 150E, section 9A provides,

> (a) No public employee or employee organization shall engage in a strike and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or witholding of services by such public employees.
> (b) Whenever a strike occurs or is about to occur the employer shall petition the commission to make an investigation. If, after the investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including but not limited to instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

[15] Chapter 121B, section 29 provides, "A housing authority shall bargain collectively with labor organizations representing its employees and may enter into agreements with such organizations. Notwithstanding any provision of law to the contrary the provisions of sections four, ten and eleven of chapter one hundred and fifty E shall apply to said authorities and trier employees." The Commission had concluded that since section 9A had not been included by reference in this provision, the legislature had not intended that such section apply to housing authorities.

the section 11 right to judicial review. The Court, however, determined that the case was properly before it irrespective of the section 11 arguments.[16] Because the Authority was contesting the Commission's jurisdiction over the labor dispute rather than a ruling made by the Commission on the merits, it could have done so, the Court reasoned, by way of a complaint for declaratory judgment under chapter 231A.

Apparently treating the underlying action as one for declaratory relief, the Court considered the Commission's jurisdiction over the Authority. In that regard it rejected the Commission's interpretation as to the effect of chapter 121B, section 29, holding instead that chapter 150E, as a later, comprehensive enactment in the area of public sector labor relations, prevailed over any inconsistent provision of the former, more specific statute. The case was remanded to the Commission for consideration of the Authority's strike investigation petition under section 9A.

Read together, these two cases seriously question whether the extremely limited right under federal labor law to obtain judicial review of a pre-hearing dismissal of an unfair labor practice charge by the General Counsel for the National Labor Relations Board applies with equal force to judicial review of pre-hearing dismissals by the Commission of parallel prohibited practice charges. Although the Commission undoubtedly would argue that *Lyons*, because of its unconstitutional implications, supports a right to review of agency fee challenges only, that conclusion does not follow from a careful reading of the Court's opinion.

The Court was concededly influenced by the constitutional concerns underlying agency fee challenges when it interpreted the term "final order" under chapter 150E, section 11, to include the dismissal by the Commission of Lyons' prohibited practice charge.[17] To concede that the Court was motivated by constitutional considerations in agency fee cases to construe section 11 review rights broadly does not, however, concede that dismissals by the Commission of other classes of prohibited practice charges are not also final orders entitled to judicial review. Indeed, now that the Supreme Judicial Court has broadly construed section 11 to permit judicial review of pre-hearing dismissals by the Commission in at least one class of charges, it necessarily follows that section 11 permits such review for all classes of charges. Stated another way, when faced with a choice between declaring section 11 unconstitutional for failing to provide meaningful judicial review of agency fee challenges, and upholding section 11 by construing the term "final order" broadly enough to encompass pre-hearing dismissals by the Commission, the Court opted

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[16] *Boston Housing Authority*, 398 Mass. at 717, 500 N.E.2d at 803, 804.

[17] *See Lyons*, 397 Mass. at 501, 492 N.E.2d at 345 where the Court noted that "[T]he constitutional nature of such agency fee complaints necessarily informs our interpretation of the term 'final orders' . . . "

for the latter approach. That approach fits more comfortably with simple logic than does the hypothesis that the legislature intended the single term "final order" to mean one thing with respect to constitutionally grounded prohibited practice charges, and altogether another with regard to all other charges.

The foregoing conclusion finds further support in *Boston Housing Authority*. Although dealing with a section 9A strike investigation petition rather than with a prohibited practice charge, and although not even expressly finding that pre-hearing dismissals of section 9A charges were final orders under section 11,[18] the Court did observe that "[t]here is no doubt that the Commission's decision in the present case was in a sense 'final' as it dismissed the petition."[19] Whether this observation will be extended into a holding that pre-hearing dismissals of both strike investigation petitions and prohibited practice charges are subject to judicial review awaits (1) an aggressive litigant who (2) has a Commission dismissal letter in hand. As both ingredients are ubiquitous, the answer should come relatively soon.[20]

§ 12.5. The Authority of the Civil Service Commission Under Chapter 31 Section 41. During the *Survey* year, the Appeals Court twice reviewed decisions of the Massachusetts Civil Service Commission at the request of a municipal employee. Both cases involved the City of Boston, the reinstatement by the Commission of public safety officers discharged for serious misconduct, and reversal of Commission orders by the court.

In *Police Commissioner of Boston v. Civil Service Commission*,[1] an on duty police officer had allegedly been drinking alcohol and engaging in sexual intercourse with an intoxicated woman in his protective custody.[2] As a result of those allegations the police department filed two specifications against the officer. The first specification charged that the officer's conduct violated departmental rules by engaging in conduct unbecoming

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[18] As noted *supra*, the Court treated the case as one for declaratory relief under chapter 231A rather than for review under section 11.

[19] *Boston Housing Authority*, 398 Mass. at 717, 500 N.E.2d at 803.

[20] There are countervailing arguments as to the reading of section 11 to be sure. Certainly it can be contended that judicial review of pre-hearing dismissals could effectively clog the system and render the Commission impotent to administer the law, a result presumably not intended by the legislature. Moreover, it can be argued that the legislature anticipated that judicial review would be as limited as that available under the parallel federal statute. *But see* Lyons v. Labor Relations Commission 19 Mass. App. Ct. 562 n.8, 476 N.E.2d 243 n.8 (1985) where the court disputed, without deciding, the Commission's contention that the federal analogy was apposite.

§ 12.5 [1] 22 Mass. App. Ct. 364, 494 N.E.2d 27 (1986).

[2] The officer allegedly had taken the woman to a private club during his evening meal break where the misconduct occured. *Id.* at 366, 494 N.E.2d at 29.

the department, by exercising unreasonable judgment, and by using alcohol on duty. Apparently in reliance upon accusations of rape later made by the woman in question, the second specification charged that the sexual intercourse was unlawful.

Following a departmental hearing, a hearing officer relied upon the failure of a grand jury to indict the officer for rape, and dismissed the second specification. He found the officer guilty of the first specification, however, and recommended that the police commissioner impose an eighteen month suspension as punishment. The police commissioner rejected the recommendation and discharged the officer. The letter of dismissal from the police commissioner to the officer referred to conduct under both specifications as justifications for the discharge.[3] The officer appealed to the Commission pursuant to chapter 31, section 43.[4]

After a hearing, the Commission ordered the police commissioner to reduce the discharge to an eighteen month suspension. The Commission apparently based its decision on its view that the second specification had not been proven and that the evidence demonstrated that the intercourse had apparently been consensual, and, thus, not unlawful.

The police commissioner appealed the Commission's decision arguing that by modifying the penalty, the Commission had erroneously substituted its judgment for his own. The superior court affirmed the Commission's decision, finding that the second specification had not been proven, and characterizing the police commissioner's contention that discharge was imposed on the basis of each specification independently as a "post hoc" statement.[5]

In a stinging decision, the Appeals Court reversed. The court commented variously that the "commission's decision . . . was based upon a profound misunderstanding of the role of a police officer,"[6] that the officer "engaged in outrageous conduct inimical to the most fundamental obligations imposed by reason of his position of police officer, a position of special trust,"[7] and that the officer was not "fit to return to duty and once again hold the trust of the public."[8] Concluding that the police commissioner's contention that the officer's termination was warranted

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[3] With respect to the second specification the commissioner noted that "[T]here was evidence presented that the person . . . did not consent to the sexual intercourse." *Id.* at 368, 494 N.E.2d at 30.

[4] Chapter 31, section 41 provides that "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged . . . ." Section 43 permits review of a discharge decision by the Commission to determine if " . . . there was just cause for (the) action . . . ."

[5] *Police Commissioner of Boston*, 22 Mass. App. Ct. at 370, 494 N.E.2d at 31.

[6] *Id.*

[7] *Id.* at 371, 494 N.E.2d at 32.

[8] *Id.*

independently on each specification "had been made clear" and was not a "post hoc" rationalization,[9] the court labeled the Commission's modification of the penalty as "capricious" and as a "substantial error of law."[10] The Appeals Court set aside the Commission's decision, and affirmed the police commissioner's decision in its entirety.

In the second case, *Fire Commissioner of Boston v. Joseph*,[11] a firefighter was discharged following adverse findings by the fire commissioner[12] after a departmental hearing in which the firefighter had been charged with aiding in the unlawful burning of a building. At a subsequent hearing before a hearing officer of the Civil Service Commission, testimony was adduced from two witnesses — co-owners of the building — that the firefighter had admitted to them participation in the arson. Excluding other hearsay evidence tending to incriminate the firefighter, the hearing officer ruled that although the testimony of the two witnesses "was credible," it was "insufficient to satisfy the burden of the Appointing Authority,"[13] because the witnesses were business partners with an obvious interest in the entire affair. Furthermore, there was no corroboration offered to support their second-hand testimony. Because this evidence was, in his view, insufficient to sustain a prima facie case, the hearing officer never explicitly resolved the credibility issue presented by the firefighter's testimonial denial of the admissions attributed to him by the co-owners.

The Civil Service Commission adopted the hearing officer's conclusions, and ordered the firefighter reinstated. From that order the fire commissioner appealed. Once again, the Appeals Court reversed the Commission.

The court viewed the scope of its review in the nature of certiorari — requiring it to "correct only those errors which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public."[14] The court concluded, therefore, that the hearing officer and the commission had so erred by requiring corroboration of the credible testimony offered by the fire commissioner's witnesses, and by failing to use that testimony to determine that the preponderance of evidence[15] supported the fire commissioner's decision. Specifically, the

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[9] *Id.* at 370 n.8, 494 N.E.2d at 31 n.8.

[10] *Id.*

[11] 23 Mass. App. Ct. 76, 498 N.E.2d 1368 (1986).

[12] The hearing was held pursuant to chapter 31, section 41.

[13] *Fire Commissioner of Boston*, 23 Mass. App. Ct. at 81, 198 N.E.2d at 1271.

[14] *Id.* at 82, 498 N.E.2d at 1372. The fire commissioner has no right to appeal from an adverse ruling pursuant to chapter 31, section 22 which provides for employee appeal only; accordingly the commissioner had filed an appeal in the nature of certiorari pursuant to chapter 249, section 4.

[15] Chapter 31, section 43 provides in relevant part that: "If the Commission by a prepon-

court ruled that the testimony offered by the co-owners was admissible hearsay under the admissions exception to the hearsay rule.[16] Accordingly, if that testimony was believable, as apparently the hearing officer found it to be, then even without corroboration it should have sustained the fire commissioner's burden of proof. Describing the hearing officer's error as purely legal, and the officer's misconduct too substantial to warrant modification of the discharge, the court saw no need to remand for further hearing at the administrative level.[17] It ordered the fire commissioner's decision reinstated.

For better or worse, the foregoing decisions appear result oriented. The Appeals Court palpably bristled at the prospect of either employee returning to a public safety position given the nature of their alleged misconduct. Moreover, in the police case the court's conclusion — that the police commissioner's contention that he would have discharged the officer on each of the specifications independently was *not* a post hoc statement — is difficult to reconcile. Its refusal to remand the fire case to the Commission for further hearing or argument on the basis of some less than explicit language regarding credibility determinations in the hearing officer report, is also difficult to explain, except in terms of result orientation. Furthermore, its decisions precluding the return of the two employees contrast starkly with the court's 1985 decision in *Town of Dedham v. Civil Service Commission*[18] in which it upheld a Commission decision reducing a mentally retarded employee's discharge to an eighteen month suspension, notwithstanding uncontroverted evidence that the employee was chronically absent and had orally and physically assaulted his superiors. It is difficult to reconcile the court's willingness to defer to the employer's discretion in the 1986 cases, but not in the 1985 case — a case in which the facts were more sympathetic to the employee — except on the basis of how their results fit the court's qualitative value judgments.

Although it is difficult to argue with the notion that a police officer who enjoys sex with a ward while on duty might not be suitable for his position, or that a firefighter who sets rather than extinguishes fires ought not to be a firefighter, the relevant inquiry is what role the Appeals Court ought to play in the disposition of such cases. Where the Civil Service Commission and the superior court both found that the police commissioner's contentions relative to his reliance on each specification independently were post hoc, it is at least arguable that the Appeals Court

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derance of the evidence determines that there was just cause for an action taken against such (employee) it shall affirm that action . . . ."

[16] The court cited LIACOS, MASSACHUSETTS EVIDENCE 276 (5th ed. 1981).

[17] *Fire Commissioner of Boston*, 23 Mass. App. Ct. at 82, 498 N.E.2d at 1373.

[18] 21 Mass. App. Ct. 904, 483 N.E.2d 836 (1985).

overstepped its role by categorically rejecting the post hoc analysis without pointing to specific record evidence to support its conclusion. A similar argument can be made with respect to the court's failure to have remanded the firefighter's case for further consideration after overturning an evidentiary ruling of the administrative hearing officer.

In any event, the Appeals Court forcefully has served notice that it will not permit technical arguments to prevail over employer discretion in civil service discharge cases involving serious breaches of the public trust. The message to employee litigants is clear; the election of a civil service forum has become inferior to arbitration given the relative standards of review adopted by the Supreme Judicial Court in the new teacher trilogy and the Appeals Court in the civil services cases.

§ 12.6. Discharge of an At-Will Employee for Reasons Which Violate Public Policy. Although the Supreme Judicial Court had implied in earlier cases[1] that it would entertain a cause of action alleging that an employee-at-will had been discharged for reasons which violated public policy, it had never been explicitly presented with such a case. The issue was concretely presented during the *Survey* year in *DeRose v. Putnam Management Co., Inc.*[2] DeRose alleged that his employer, a computer management company, discharged him for refusing to testify in the theft trial of a co-employee. A superior court judge denied the employer's motion for a directed verdict, holding that DeRose could recover if the jury believed that his discharge violated public policy.[3] The jury, in turn, reached a verdict of $9,000 for DeRose on a contract theory. DeRose appealed the adequacy of the verdict and his employer cross-appealed. The Supreme Judicial Court granted a request for direct appellate review.[4]

The Court affirmed, observing that the majority rule in other jurisdictions, and the predominant view in legal periodicals, favored judicial relief for an employee discharged in violation of public policy. In doing so, the Court expressly extended its prior case law, which awarded relief to at-will employees only where the employer had discharged them in a bad faith effort to gain an unfair financial advantage,[5] to discharge in

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§ 12.6 [1] See Cort v. Bristol Myers, 385 Mass. 300, 303, 431 N.E.2d 908, 910 (1982) where the Court, citing Gram v. Liberty Mutual Ins. Co., 384 Mass. 659, 429 N.E.2d 21 (1981), stated that "termination of at-will employment could give rise to a claim where the reason for the discharge was contrary to public policy."

[2] 398 Mass. 205, 496 N.E.2d 428 (1986).

[3] *Id.* at 206, 496 N.E.2d at 429.

[4] *Id.*

[5] *See, e.g.*, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

violation of public policy "even in cases where the employer does not gain a financial advantage."[6]

Regarding DeRose's claim that he was entitled to recover punitive damages, the Court noted that the case had been tried on a contract theory, and that punitive damages were unavailable in contract.[7] For the same reason, the Court also rejected DeRose's appellate claim for damages grounded in tort. Describing the tort damages as belated, the Court refused to consider it, albeit acknowledging that other jurisdictions have allowed tort damages in public policy discharge cases.[8] Finally, with respect to DeRose's claim for additional damages in contract, the Court viewed that claim, under the circumstances, as a "quarrel with the damages awarded by the jury," expressed "no opinion as to the proper measure of contract damages in a case such as this."[9]

DeRose is significant both for what it decided and for what it did not decide. In the former respect it reflects the latest step in the Court's cautious, but definite, inroad into the employment-at-will doctrine.[10] Now having accepted a wrongful discharge case where the public policy favoring truthful testimony in a judicial proceeding has been sufficiently implicated, it is expected that in coming years the Court will extend *DeRose* to other employment-at-will discharges which similarly implicate other important public policies. Although it is difficult to specify the parameters of the public policy exception to the employment-at-will doctrine, it is fair to assume that many of the fact patterns involved in other public policy cases decided in other jurisdictions, and cited at footnote 6 in *Gram v. Liberty Mutual*,[11] will fall within the exception. Thus, it is likely that the *DeRose* principles would cover, for example, termination of at-will employment for filing a workman's compensation claim, for serving on a jury, or for refusing to engage in an illegal activity.

For the question answered by *DeRose*, however, an important new one was also posed. As noted, the Court refused to consider a tort measure of damages advanced by DeRose on appeal.[12] Although the Court did not reveal its thinking on whether tort damages would be

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[6] *DeRose*, 398 Mass. at 210, 496 N.E.2d at 431.

[7] *Id.* at 212, 496 N.E.2d at 432 (citing Hall v. Paine, 224 Mass. 62, 68, 112 N.E. 153 (1916) and 5 A. CORBIN, CONTRACTS, § 1077 (1951)).

[8] *Id.* at 212 n.7, 496 N.E.2d at 432 n.7.

[9] *Id.* at 213, 496 N.E.2d at 433.

[10] See Gram v. Liberty Mutual Ins. Co., 384 Mass. 659, 668 n.6, 429 N.E.2d 21, 27 n.6 (1981), where the Court observed that "[T]he general rule that an employee-at-will contract could be terminated at any time for any reason or no reason at all was regarded as well established until recently."

[11] 384 Mass. 659, 668 n.6, 429 N.E.2d 21, 27 n.6 (1981).

[12] *DeRose*, 398 Mass. at 212, 496 N.E.2d at 432.

available if properly pleaded and tried, it dropped a tantalizing footnote in which it acknowledged without further comment that plaintiffs in other jurisdictions had been permitted to "seek liability in tort for violations of public policy."[13]

The answer to this latest question in the emerging area of at-will employment litigation is significant. The Court has expressly noted that "[a] contract at will is not a contract for life or a term of years. Thus, there can be no recovery for future lost wages and benefits based on the contract at will."[14] Accordingly, absent a tort measure of damages, any recovery for at-will plaintiffs discharged in violation of public policy would be relatively limited.[15] Likewise, the risks for an employer anxious to fire an at-will employee who, for example, refuses to lie for an employer, would be relatively low if limited contract damages constituted the employee's only resource. Conversely, the availability of tort damages could substantially increase the scope of employee recoveries in *DeRose* type case. The answer to the damage question, and with it the key to the future of the at-will employment litigation in Massachusetts, will likely be forthcoming soon.

§ 12.7. The Use of Polygraph Testing on Employees. Debate, legislation, and litigation over attempts by public and private employers to obtain information through non-traditional means from and about their employees is likely to dominate the latter half of the 1980's. In particular, issues will proliferate regarding the relative rights of employees and employers over urinalysis testing of employees for controlled substances and polygraph testing of employees for truthfulness of various pieces of information which employers demand. During the *Survey* year an important amendment to the state's polygraph law, chapter 149, section 14B, became effective. In *Patch v. Mayor of Revere*,[1] the Supreme Judicial Court summarized and further clarified the law regarding a police department's right to conduct polygraph tests on police officers during the course of a criminal investigation which arguably implicated the officers' fitness to perform their job duties.

Prior to 1986, General Laws chapter 149, section 14B — encaptioned "Use of Lie Detector Tests by Employers Prohibited" — was purely a criminal statute. It imposed a $200 fine on employers who subjected employees or job applicants to a lie detector test. The law provided an

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[13] *Id.* at 212 n.7, 469 N.E.2d at 432 n.7.

[14] *Id.* at 211 n.4, 469 N.E.2d at 431 n.4.

[15] *Cf. id.* at 213, 469 N.E.2d at 433, where the Court, although upholding the jury's $9,000 verdict to DeRose, expressly refused to comment on the proper measure of the contract damages "in a case such as this."

§ 12.7 [1] 397 Mass. 454, 492 N.E.2d 77 (1986).

exception, however, for testing permitted in the course of criminal investigations.[2] By Chapter 587 of the Acts of 1985, effective in part on March 16, 1986, and in whole on September 30, 1986, the legislature increased the criminal sanctions in the polygraph law and added important substantive rights for employees. The amended law expressly renders it unlawful for an employer either to request or subject employees,[3] or applicants for employment, to polygraph tests and/or "to discharge, not hire or demote or otherwise discriminate against" any such persons for asserting rights under the statute. Furthermore, the amendment, in an apparent attempt to close a loophole in the pre-existing statute, expressly extends the prohibition on polygraph testing to tests performed outside of Massachusetts but which related to employment within the state. The statute requires employers to include a notice on all applications for employment advising employees of the illegality of polygraph testing as a condition of employment. Finally, the amendment expressly creates a civil cause of action for any aggrieved person, authorizes the issuance of injunctive relief, treble damages, and attorney's fees for a prevailing party.

By its amendment the legislature has spoken clearly and definitively on the public policy of the Commonwealth in the area of polygraph testing. It has simultaneously rendered moot speculation as to whether the courts would entertain a common law suit, grounded in a *DeRose* type theory,[4] for discharge over a protected refusal to submit to polygraph testing.

What the amendment did not do, however, was clarify the scope of the exception for polygraph testing of employees which "may be otherwise permitted in criminal investigations."[5] Because the statute offers no insight into the nature of "otherwise permissible" polygraph testing done in conjuction with criminal investigations, the exception should continue to provide grist for litigation as it did during the *Survey* year.

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[2] The statute provides:

> Any employer who subjects any person employed by him, or any person applying for employment, including any person applying for employment as a police officer, to a lie detector test, or requests, directly or indirectly, any such employee or applicant to take a lie detector test, shall be punished by a fine of not more than two hundred dollars. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations.

G.L. c. 149, § 14B.

[3] The exception for "lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations" was also continued by the amendment. *See* G.L. c. 149, § 14B(2).

[4] *See supra* § 9.6.

[5] G.L. c. 149, § 14B(2).

Patch v. Mayor of Revere arose out of a criminal investigation by the Revere police department and the state police over allegations that certain Revere police officers had received advanced copies of a 1983 civil service promotional examination for the rank of sergeant. The chief of the Revere police directed each of the suspected officers to take a polygraph test in connection with the ongoing investigation. Each officer refused the order on constitutional grounds, and a group of officers sought a preliminary injunction enjoining the polygraph testing. The superior court denied that request,[6] and the Supreme Judicial Court granted the officers' request for direct appellate review.

In a succinct opinion, the Court reviewed existing case law regarding the use of polygraph testing on police employees. As its premise, the Court first observed that "a public employer has authority to compel an employee, under threat of discharge for noncooperation, to answer questions reasonably related to the employee's ability and fitness to perform his [or her] official duties"[7] and that "as a matter of constitutional principle, any answers given to such questions may not be used against the employee in a *criminal* proceeding."[8] The Court noted further that it has held previously that the authority of a police department "to examine employees relative to allegations of criminal conduct is the same for both conventional and polygraph examinations."[9] Finally, the Court reiterated that because law enforcement agencies had been expressly exempted by the legislature from the prohibitions of chapter 149, section 14B, "there are no statutory 'restrictions on a police department's testing of its own employees' in the course of a criminal investigation."[10]

Turning to the case at bar, the Court addressed the plaintiff's claim that sanctions for refusal to submit to a polygraph test violated due process rights protected by the state and federal constitutions, a claim which the Court acknowledged it had not addressed in prior decisions.[11] With respect to substantive due process, the Court concluded that the demand that the officers submit to a lie detector test under the facts of the case was not so irrational as to violate the applicable constitutional protections. The Court suggested by analogy that the threshold of un-

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[6] The superior court judge did, however, condition the testing on certain procedural safeguards including: service of the advance notice as to the subject matter of the test; a grant of "use" immunity to each officer; assurance that the test be conducted by a competent, independent examiner; and service on each officer of the test material and examiner's report. *See Patch*, 397 Mass. at 455 n.3, 492 N.E.2d at 78 n.3.

[7] *Id.* (citations omitted).

[8] *Id.* (citations omitted and emphasis added).

[9] *Id.* at 456, 492 N.E.2d at 79 (citing Baker v. Lawrence, 379 Mass. 322, 332, 409 N.E.2d 710 (1979)).

[10] *Id.*

[11] *Patch*, 397 Mass. at 457, 492 N.E.2d at 79.

constitutionality in substantive due process grounds was something akin to trial by ordeal.[12]

As to the issue of procedural due process, the Court was similarly unimpressed. The opinion stated that the plaintiffs had a statutory right, under the civil law, to a pretermination hearing. The Court reasoned, therefore, that the plaintiffs had a forum in which to raise any objection to the imposition of discipline ensuing from polygraph results. Although the Court noted that it saw no "fatal objection"[13] to such use of polygraph results by the police department on the record before it, the civil service hearing would provide an opportunity to explore the issue more fully, and thus satisfy procedural due process requirements.

The Court in *Patch* indicated that it did not have to decide whether failure to comply with an order to submit to a polygraph examination "could after a hearing by itself be 'just cause' to discharge a police officer."[14] It expressly limited its decision to holding that "due process does not require that the mayor and chief of police be enjoined from insisting that the plaintiffs comply with properly issued orders directing them to submit to polygraph examinations."[15] There are compelling indications within the Court's opinion, however, that a police officer can be terminated for refusing to take a duly ordered and suitably limited polygraph exam given in conjunction with a good faith criminal investigation. It is also probable from its dicta that the Court would permit the discharge of a police officer who had enjoyed a pretermination hearing on the basis of evidence elicited from the polygraph exam.

What remains unanswered, however, is whether the *Patch* Court's analysis of the rights of police officers who are ordered to take a polygraph exam as part of an ongoing criminal investigation, applies with equal force to non-police public employees who are similarly ordered to undergo such an exam. More particularly stated, does the polygraph examination of a public employee, other than a police officer, conducted by a law enforcement agency in the course of a criminal investigation qualify under the "otherwise permitted" exception to the statutory prohibition against polygraph testing in chapter 149, section 14B?

The evidence of the Court's view on this question is equivocal. Al-

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[12] *Id.* Whether or not the imposition of a polygraph test upon threat of job sanctions violates substantive due process, the reference to trial by ordeal as the standard against which the question is to be answered is seemingly anachronistic. It does not appear that in the 1980's a public employee must show that his feet are about to be scalded by hot coals as a test of his fitness for duty before obtaining constitutional relief. For some years now even a convicted murderer need not have shown that the State planned to burn him at the stake in order to invoke protection against cruel and unusual punishment.

[13] *Id.*

[14] *Id.* at 458, 492 N.E.2d at 80.

[15] *Id.*

though all relevant cases decided by the Court have involved the polygraph testing of police officers,[16] the language employed in the seminal case, *Baker v. Lawrence*,[17] suggested that the exception within section 14B was not limited solely to the testing of police officers. Thus, in discussing the principles of law applicable to its decision, the Court offered the following explanation of section 14B:

> The second sentence propounds an exception to the first. The situation plainly within the exception is one where a law enforcement agency is conducting an investigation into a crime alleged to have been committed by a *person* in connection with the duties of his employment, and the agency is permitted, i.e., not forbidden, to administer a polygraph test to that *employee*. If, then, the *employee* refuses or indicates hesitance to submit to the test at the agency's request, the employer (relieved of the prohibition of the first sentence of § 19B) may request that the *employee* do so, with implied job sanctions if the *employee* finally declines . . . .
>
> The legislature, although generally averse to tests forced by employers upon their *employees*, here recognized an evident interest of the employer in applying some pressure to assist an investigation leading to exoneration of the *employee* or the opposite.[18]

The Court's frequent reference to "person" or "employee," without limiting the scope of its explanation to the position of police officer, appears to suggest that it views section 14B as a clause of general application to all employees. Such a reading of section 14B, however, would also seem to dilute substantially the protection the statute affords non-police employees. Although polygraph testing of applicants for employment seems logically to fall outside the criminal investigation exception, the resort to testing current employees more likely than not will arise from a theft or similar occurrence which is criminal in nature. Thus, by reporting the alleged crime to a law enforcement agency, the employer could force tests upon current employees without fear of violating the statute. Very little, it seems, would be left out of the statutory protection for persons once employed.

If *Patch* is instructive at all on this point, it is for its retreat from *Baker's* general language to language which focuses solely upon the right of a police department to test its own officers in furtherance of an ongoing criminal investigation. When commenting on the right to obtain information from employees through means other than polygraphy, the Court again used the terms employer and employees in a generic sense. When discussing its prior holdings under section 14B, however, the Court's language was noticeably more circumspect.[19]

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[16] *See, e.g.*, Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n, 391 Mass. 429, 462 N.E.2d 96 (1984).

[17] 379 Mass. 322, 409 N.E.2d 710 (1979).

[18] *Id.* at 327–28, 409 N.E.2d at 713–14 (emphasis added).

[19] The specific language is:

In light of the Court's language in *Patch*, which is focused on police officers, and its citation to *Baker* in support of that language, the most that can be said from the case law at this point is that the exception in section 14B permits a police department to test its own police officers by polygraph when the department is investigating an alleged crime. Whether the exception applies to non-police employees remains an open question.

§ 12.8. The Amendment to Chapter 150E. In the private sector, the balance of bargaining power between labor and management is in large measure preserved by management's right, upon reaching a good faith impasse, to implement the terms of a final offer.[1] Labor's corresponding right is to strike in support of its contract demands.[2] In Massachusetts, chapter 150E, governing public employees, has preserved the employer's right to implement its last offer upon impasse,[3] but has strictly prohibited public employees from striking over contract demands.[4] In place of the right to strike, chapter 150E requires the public employer to engage in a fact-finding proceeding over unresolved bargaining issues, and to engage in post fact-finding negotiations, with the aid of the fact-finder's report, in an attempt to reach agreement.[5]

Because the Legislature specifically excepted law enforcement agencies from the prohibitions of G.L. c. 149, § 19B (1984 ed.), there are no statutory "restrictions of a police department's testing of its own employees in the course of criminal investigations." *Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n*, 391 Mass. 429, 440–41, 462 N.E.2d 96 (1984).

We have noted that, despite limitations on the evidential use of its results in criminal proceedings, polygraph testing may further both the proper needs of certain criminal investigations and the public's interest in preserving the credibility and the integrity of its police force. See *Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n*, 391 Mass. 429, 439–44, 462 N.E.2d 96 (1984); *Baker v. Lawrence*, *supra* 379 Mass. at 328 nn. 9 & 11, 409 N.E.2d 710 . . . .

Our cases have suggested that refusal to submit to an examination, whether by polygraph or otherwise, would constitute good cause to discharge a tenured police officer. See *Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n*, *supra* 391 Mass. at 440–41, 462 N.E.2d 96; *Baker v. Lawrence*, *supra*, 379 Mass. at 332, 409 N.E.2d 719; *Silverio v. Municipal Court of the City of Boston*, 355 Mass. 623, 630, 247 N.E.2d 379, *cert. denied*, 396 U.S. 878, 90 S. Ct. 141, 25 L.Ed.2d 135 (1969).

Patch, 397 Mass. at 457, 492 N.E.2d at 79.

§ 12.8 [1] *See* NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964).

[2] *See* the Labor Relations Management Relations Act, as amended, 29 U.S.C. § 163 which states: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[3] *See* Hanson School Committee, 5 MCL 1671 (1979).

[4] *See* G.L. c. 150E, § 9A(a).

[5] *See id.*

Because the fact-finder's report is not binding on either party, however, labor generally regards the fact-finding process as an inadequate substitute for the right to strike. Moreover, because the employer's right to implement its last offer attached upon reaching impasse — a state reached prior to fact-finding[6] — unions could and have been faced with post fact-finding negotiations in the face of a *fait accompli.* Any value that fact-finding might otherwise have had as an equalizer in the area of bargaining power was obviously subject to dissipation by the public employer's lawful, pre-emptive imposition of its final order.

During the *Survey* year the legislature, although preserving the strike prohibition, amended chapter 150E in an effort to reduce the employer advantage in the bargaining power equation. Specifically, the legislature amended chapter 150E, section 9,[7] by adding the following paragraph:

> Upon the filing of a petition pursuant to this section for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact-finding or arbitration, if applicable, shall have been completed and the terms and conditions of employment shall continue in effect until the collective bargaining process, including mediation, fact-finding, or arbitration, if applicable, shall have been completed; provided, however, that nothing contained herein shall prohibit the parties from extending the terms and conditions of such a collective bargaining agreement by mutual agreement for a period of time in excess of the aforementioned time. For purposes of this paragraph, the board shall certify to the parties that the collective bargaining process, including mediation, fact-finding or arbitration, if applicable, has been completed.[8]

By prohibiting the public employer from implementing any unilateral changes in contractual terms until the completion of fact-finding, the statute advances the bargaining power of the unions in at least two ways. First, where the employer's bargaining agenda includes time sensitive proposals for change, there is greater likelihood that the employer will be willing to compromise in order to achieve its proposal quickly, knowing that lack of agreement will result in a lengthy delay for the mediation and fact-finding process. Second, even where time sensitive proposals are not paramount, it is simply easier for a union to bargain successfully

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[6] *Id.* Paragraph four of § 9 states, *inter alia*, that "if the impasse continues after the conclusion of mediation, either party . . . may petition . . . to initiate factfinding." *See also* Moses v. Labor Relations Commission, 389 Mass. 920, 452 N.E.2d 1117 (1983), where the Court expressly ruled that a public employer may implement its last offer following impasse even though factfinding has not yet been conducted.

[7] Chapter 198 of the Acts of 1986 amended § 9 as quoted above. As well, that amendment empowered a mediator to order that the parties provide specific representatives authorized to enter into collective bargaining agreements be present at bargaining meetings designed to end an impasse.

[8] G.L. c. 105E, § 9.

before the employer has implemented changes than it is after the change has become effective.[9]

Although it is too early to predict the impact that the amendment will have on the bargaining process, it is at least possible, if not probable, that collective bargaining agreements will be more quickly resolved as a result of greater balance in the parties' bargaining power. In any event, even without the right to strike, the public unions are assuredly better off because of the amendment.

[9] For this reason the Commission, upon finding that an employer unilaterally changed employment conditions prior to impasse, will normally order the changes rescinded as part of its overall remedy. *See* School Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557, 447 N.E.2d 1201 (1983).